

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,)	File No. 21-CR-108
)	(1,2,3,4) (PAM/TNL)
Plaintiff,)	
)	Via Zoom
vs.)	Videoconferencing
)	
Derek Michael Chauvin (1),)	Minneapolis, Minnesota
Tou Thao (2),)	Courtroom 15
J Alexander Kueng (3),)	September 14, 2021
Thomas Kiernan Lane (4),)	10:00 a.m.
)	
Defendants.)	
)	
)	
)	

BEFORE THE HONORABLE TONY N. LEUNG

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(ARRAIGNMENT AND MOTIONS HEARING)

MARIA V. WEINBECK, RMR-FCRR
Official Court Reporter
United States District Court
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

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**Proceedings reported by court reporter; transcript
produced by computer.**

P R O C E E D I N G S

IN OPEN COURT

(10:02 a.m.)

THE COURT: Thank you, everyone. If you're standing, please be seated.

Okay, lawyers, just to give you an update. I'm going to do the motions separately for each of the individual defendants. It's just going to be easier for me to keep track of notes and so forth, and I know that's going to test your patience as you're waiting in line, but I think it will be much easier for the Court to keep track of the approximately 40 motions that are before the Court.

We will hear at least one of the motions together for oral arguments, and they'll be with the severance motion. So I think it's time to get going formally.

This is the United States District Court for the District of Minnesota. And the case before the bench today for arraignment and for oral arguments on motions is captioned as follows:

The United States of America versus Derek Michael Chauvin, who is Defendant Number 1 in case number 21-CR-108; and Mr. Tou Thao, who is Defendant Number 2; J. Alexander Kueng, who is Defendant Number 3; and Thomas Kiernan Lane, who is Defendant Number 4. And we are here again for arraignment and oral arguments.

1 We are appearing, of course, by video telephone
2 conference, and I just want to go over some things with
3 everybody, but before we do that, I want to identify the
4 parties who are here and their respective counsel starting
5 with the government.

6 MS. SERTICH: Good morning, Your Honor.
7 Assistant United States Attorney Manda Sertich on behalf of
8 the government. I'm joined by Samantha Trepel from the
9 Department of Justice Civil Rights Division.

10 THE COURT: Good morning. And, Ms. Trepel, could
11 you say something so we could at least test the audio. I
12 believe all the audio has been tested but just in case.

13 MS. TREPEL: Good morning, Your Honor.

14 THE COURT: Okay. Thank you. And for
15 Mr. Chauvin, please.

16 MR. NELSON: Good morning, Your Honor. Eric
17 Nelson appearing on behalf of Mr. Chauvin. Mr. Chauvin
18 appears in custody via Zoom videoconferencing.

19 THE COURT: Very well. Mr. Chauvin, can you hear
20 us? Is he on mute?

21 Mr. Chauvin, could you greet us so we can make
22 sure your audio is working?

23 DEFENDANT CHAUVIN: Good morning, Your Honor.
24 Can you hear me now?

25 THE COURT: Yes, we can. Okay. And, thank you,

1 Mr. Nelson, and good morning, Mr. Chauvin.

2 And for Mr. Thao?

3 MR. PAULE: Good morning, Your Honor. Robert
4 Paule, appearing along with Natalie Paule, same spelling, on
5 behalf of Mr. Thao, who is present via Zoom. Good morning,
6 everyone.

7 THE COURT: Good morning, Mr. Paule, and
8 Ms. Paule, and also Mr. Thao. I thought I saw you earlier
9 here. There you are. Okay. Could you say something, I
10 suppose could you just say something? State your name, so
11 we can just make sure your audio is working too.

12 DEFENDANT THAO: Good morning, sir. My name is
13 Tou Thao.

14 THE COURT: Is there a way you can get a little
15 closer to the screen so that you can appear? I think if you
16 come closer together, you'll be able to see. Okay. Thank
17 you.

18 And let me double check, could you hear the
19 government and the others that have spoken so far, Mr. Paule
20 and Mr. Thao?

21 MR. PAULE: Yes, Your Honor.

22 THE COURT: And Ms. Paule?

23 MS. PAULE: Good morning, Your Honor. I was able
24 to hear everything.

25 THE COURT: Okay. And let me just circle back to

1 Mr. Nelson. Mr. Nelson and Mr. Chauvin, can you guys hear
2 everybody that's spoken so far? Mr. Nelson?

3 MR. NELSON: Yes, Your Honor.

4 DEFENDANT CHAUVIN: Yes, Your Honor.

5 THE COURT: Very well.

6 And, next, Mr. Plunkett, good morning. Could you
7 identify yourself for the record?

8 MR. PLUNKETT: Good morning, Your Honor. Thomas
9 Plunkett on behalf of Mr. Kueng. Mr. Kueng is present with
10 me. We've been able to hear the Court and everyone that's
11 spoken so far.

12 THE COURT: Okay. And, Mr. Kueng, maybe you could
13 just say something so I can at least tell if we can hear
14 you.

15 DEFENDANT KUENG: Good morning, Your Honor. Mr.
16 Kueng here before the Court.

17 THE COURT: Thank you. Okay.

18 And, Mr. Gray, please.

19 MR. GRAY: Good morning, Your Honor. Earl Gray
20 representing Thomas Lane. Mr. Lane is sitting to my left
21 here. Can you see him, Your Honor?

22 THE COURT: Yes, I can.

23 MR. GRAY: Do you want him to say something?

24 THE COURT: Yes that would be great.

25 DEFENDANT LANE: Good morning, Your Honor. I've

1 been able to hear everything this far.

2 THE COURT: Okay. You anticipated my question.
3 Thank you.

4 Okay. Let me circle back again then to the
5 government. Ms. Sertich, Ms. Trepel, could you hear all the
6 defense and defendants?

7 MS. SERTICH: I could, Your Honor, thank you.

8 MS. TREPEL: Yes, Your Honor. No trouble hearing
9 anyone.

10 THE COURT: Okay. As a reminder, members of the
11 media and those members of the public here with us today,
12 any recording of a proceeding held by video or telephone
13 conference or video conference, including screen shots or
14 other visual or audio copying of a hearing is strictly
15 prohibited. Violation of these prohibitions may result in
16 sanctions.

17 Due to the exigencies of the global pandemic, we
18 are appearing virtually today by telephone teleconferencing
19 technology. Defendants Derek Michael Chauvin, Tou Thao, J
20 Alexander Kueng and Thomas Kiernan Lane are all appearing
21 remotely today. Through counsel, each defendant has filed a
22 notice of consent for video conferencing for the purposes of
23 conducting this arraignment and motions hearing.

24 I will skip the ECF numbers, but I believe those
25 will be found in the record. At the same time, even though

1 we have that, obviously, you can change your mind, so I do
2 want to double check for purposes of this morning that
3 everyone is okay to proceed by video conference.

4 Beginning with you, Mr. Chauvin, are you willing
5 to proceed by video conferencing today for your arraignment
6 and motions hearing?

7 DEFENDANT CHAUVIN: Yes, Your Honor, I am.

8 THE COURT: Do you know you have the right to have
9 an in-person arraignment and motions hearing?

10 DEFENDANT CHAUVIN: Yes, Your Honor.

11 THE COURT: Have you had a chance to speak to
12 Mr. Nelson about that?

13 DEFENDANT CHAUVIN: I have, Your Honor.

14 THE COURT: And, Mr. Chauvin, do I have your
15 consent to proceed then to conduct this arraignment and
16 motions hearing by video?

17 DEFENDANT CHAUVIN: Yes, Your Honor.

18 THE COURT: And is your consent knowing and
19 voluntary?

20 DEFENDANT CHAUVIN: Yes, it is.

21 THE COURT: Okay, very well. Mr. Nelson, anything
22 else from your end?

23 MR. NELSON: No, Your Honor.

24 THE COURT: Okay, thank you.

25 Turning to you, Mr. Thao. Okay, there you are.

1 Are you willing to proceed by video conferencing today for
2 your arraignment and motions hearing?

3 DEFENDANT THAO: Yes, Your Honor.

4 THE COURT: And do you know that you have the
5 right to an in-person arraignment and motions hearing?

6 DEFENDANT THAO: Yes, Your Honor.

7 THE COURT: And have you had a chance to talk to
8 Mr. Paule and Ms. Paule about what to do there?

9 DEFENDANT THAO: Yes, Your Honor.

10 THE COURT: And how do you want to proceed here
11 today? Are you giving your consent to conduct the
12 arraignment and motions hearing by video?

13 DEFENDANT THAO: Yes, Your Honor.

14 THE COURT: Okay. Mr. Paule, anything else?

15 MR. PAULE: No. Thank you, Your Honor.

16 THE COURT: Okay. And, Mr. Kueng, are you willing
17 to proceed by video conference for your arraignment and
18 motions hearing?

19 DEFENDANT KUENG: Yes, Your Honor.

20 THE COURT: And do you understand you have a right
21 to have an in-person hearing on both of those?

22 DEFENDANT KUENG: I do, Your Honor.

23 THE COURT: And have you had a chance to talk to
24 Mr. Plunkett about that?

25 DEFENDANT KUENG: I have, Your Honor.

1 THE COURT: And are you giving your consent to
2 proceed by video today?

3 DEFENDANT KUENG: Yes, Your Honor.

4 THE COURT: And is your consent knowing and
5 voluntary?

6 DEFENDANT KUENG: Yes, Your Honor.

7 THE COURT: Okay. I may have missed that question
8 with you, Mr. Thao, so is your consent knowing and
9 voluntary?

10 DEFENDANT THAO: Yes, Your Honor.

11 THE COURT: All right, thank you.

12 So I'll circle back lastly to Mr. Lane, okay,
13 there you are with Mr. Gray. Are you, Mr. Lane, willing to
14 proceed by video conferencing today for your arraignment and
15 motions hearing?

16 DEFENDANT LANE: Yes, Your Honor.

17 THE COURT: And do you understand you have a right
18 to have an in-person arraignment and motions hearing?

19 DEFENDANT LANE: I do, Your Honor.

20 THE COURT: Have you had a chance to talk to
21 Mr. Gray your attorney about that?

22 DEFENDANT LANE: Yes, Your Honor.

23 THE COURT: And, Mr. Lane, do I have your consent
24 to conduct your arraignment and motions hearing by video
25 today?

1 DEFENDANT LANE: You do, Your Honor.

2 THE COURT: And is your consent knowing and
3 voluntary?

4 DEFENDANT LANE: Yes, Your Honor.

5 THE COURT: Well, I'll ask Messrs. Chauvin, Thao,
6 Kueng and Lane, I ask that you be sure, all four of you,
7 make sure you let us know at any time if you can't hear the
8 proceedings or your video goes out, wave, do something,
9 especially Mr. Chauvin, you're at a remote location, so
10 you'll have to wave or do something so we can get your
11 attention, and I would encourage you to do that if you can't
12 hear or see at any point even if someone is in the midst of
13 speaking.

14 Please also be aware that unless you are in a
15 private breakout room with your attorney, anything you say
16 can be heard by all participants in this Zoom hearing,
17 including counsel for the government. If at any point
18 during the hearing you need to consult with your attorney,
19 please let us know so that we can facilitate that with a
20 virtual private conference room.

21 So at this point, I'll proceed with the first part
22 of this hearing today, and that is with arraignment starting
23 with Mr. Nelson, your client Mr. Chauvin. Mr. Nelson, is
24 your client ready to proceed with arraignment?

25 MR. NELSON: We are, Your Honor.

1 THE COURT: Okay. Sir, if you could state your
2 name, full name please, Mr. Chauvin?

3 DEFENDANT CHAUVIN: It's Derek Michael Chauvin.

4 THE COURT: And could you spell your full name for
5 the record?

6 DEFENDANT CHAUVIN: Yes, it's D-E-R-E-K
7 M-I-C-H-A-E-L, last name is C-H-A-U-V-I-N.

8 THE COURT: Thank you. What is your year of
9 birth?

10 DEFENDANT CHAUVIN: 1976.

11 THE COURT: Have you received a copy of the
12 document called an indictment?

13 DEFENDANT CHAUVIN: Yes, Your Honor.

14 THE COURT: Now we could read that in open court
15 for you today or you can waive that; how do you want to
16 proceed on that?

17 DEFENDANT CHAUVIN: I'll waive it at this time.

18 THE COURT: Mr. Nelson, go ahead.

19 MR. NELSON: I apologize, Your Honor, I was just
20 going to advise the Court we waive the reading.

21 THE COURT: And I think that's what Mr. Chauvin
22 indicated as well. We'll note that for the record.

23 Mr. Chauvin, to the allegations against you in the
24 indictment, do you plead guilty or not guilty?

25 DEFENDANT CHAUVIN: Not guilty, Your Honor.

1 THE COURT: And the Court notes that, and we will
2 enter a not guilty plea on your behalf at this time.

3 Okay. Moving on to Mr. Thao. Mr. Paule, are you
4 and your client ready to proceed with arraignment?

5 MR. PAULE: Yes, we are, Your Honor.

6 THE COURT: And, Mr. Thao, could you state your
7 full name for the record?

8 DEFENDANT THAO: Tou Thao.

9 THE COURT: Could you spell your name for the
10 record?

11 DEFENDANT THAO: First name T-O-U, last name
12 T-H-A-O.

13 THE COURT: What is your year of birth, sir?

14 DEFENDANT THAO: 1986.

15 THE COURT: Have you received a copy of the
16 document called an indictment?

17 DEFENDANT THAO: I have, Your Honor.

18 THE COURT: And we can read it for you in open
19 court here if you want or you can waive it. What do you
20 want to do?

21 DEFENDANT THAO: I'll waive it, Your Honor.

22 THE COURT: We'll note the waiver of the reading
23 then. And to the allegations against you, Mr. Thao, in that
24 indictment, do you plead guilty or not guilty?

25 DEFENDANT THAO: Not guilty.

1 THE COURT: And the Court notes your not guilty
2 plea, and we'll enter it in the record.

3 Next, Mr. Kueng, could you state and -- state your
4 full name for the record, please?

5 DEFENDANT KUENG: J Alexander Kueng.

6 THE COURT: And could you spell that for us?

7 DEFENDANT KUENG: Yes, Your Honor.

8 J, A-L-E-X-A-N-D-E-R, last name K-U-E-N-G.

9 THE COURT: And, sir, what is your year of birth?

10 DEFENDANT KUENG: 1993, Your Honor.

11 THE COURT: Have you received a copy of the
12 indictment?

13 DEFENDANT KUENG: I have, Your Honor.

14 THE COURT: And do you want us to read it to you
15 in open court or are you okay waiving the reading of it?

16 DEFENDANT KUENG: I will waive the reading of it.

17 THE COURT: And to the allegations in that
18 indictment against you, Mr. Kueng, do you plead guilty or
19 not guilty?

20 DEFENDANT KUENG: Not guilty, Your Honor.

21 THE COURT: The Court notes your not guilty plea,
22 and we'll enter it in the record.

23 And, Mr. Lane, I'll turn to you. Could you state
24 your full name for the record?

25 DEFENDANT LANE: Thomas Kiernan Lane.

1 THE COURT: And, sir, could you spell your name
2 for the record?

3 DEFENDANT LANE: T-H-O-M-A-S K-I-E-R-N-A-N
4 L-A-N-E.

5 THE COURT: What is your year of birth?

6 DEFENDANT LANE: 1983, Your Honor.

7 THE COURT: Did you get a copy of the document
8 called an indictment?

9 DEFENDANT LANE: I did, Your Honor.

10 THE COURT: And do you want us to read that to you
11 in court or do you want to waive the reading of it?

12 DEFENDANT LANE: I'll waive that, Your Honor.

13 THE COURT: Okay. To the allegations against you,
14 Mr. Lane, in that indictment, do you plead guilty or not
15 guilty?

16 DEFENDANT LANE: Not guilty, Your Honor.

17 THE COURT: The Court notes your not guilty plea,
18 and we'll enter that into the record.

19 All right. Government, anything else on the
20 motions aspect of this proceeding today?

21 MS. SERTICH: No, Your Honor.

22 THE COURT: All right. Very well. Anything else
23 from you, Mr. Nelson, for purposes of arraignment?

24 MR. NELSON: No, Your Honor.

25 THE COURT: Mr. Paule?

1 MR. PAULE: No, thank you, Your Honor.

2 THE COURT: Mr. Plunkett?

3 MR. PLUNKETT: No, Your Honor.

4 THE COURT: Mr. Gray?

5 MR. GRAY: No, Your Honor.

6 THE COURT: Thank you. We move on then to the
7 motions hearing and oral arguments of this hearing. And for
8 the motions hearing, I am planning on first addressing the
9 joint motion for expert disclosure and expert scheduling
10 order. I will then address each individual defendant's
11 motions one at a time. We will then have oral argument on
12 the motions to sever.

13 Lastly, I want to let the parties know that I am
14 planning on ordering post-hearing briefing on certain
15 motions. I don't need them on all of them. We will discuss
16 that briefing and the schedule at the end of the hearing.

17 So I'm going to turn right now to the joint
18 motion. That is ECF No. 91, Joint Motion For Expert
19 Disclosure and Notice of Intent To Seek An Expert Scheduling
20 Order. I received an e-mail, or the Court received an
21 e-mail this morning, and it is from Ms. Sertich. It was
22 sent about 8:51 a.m. this morning to my chambers e-mail.
23 And in essence it says, I'll just read it:

24 "Following Judge Leung's suggestion that the
25 parties meet and confer regarding dates for expert

1 disclosures, the parties conferred on Monday,
2 September 13th. The parties have agreed to the following
3 proposal for such deadlines:

4 All parties' initial expert disclosures due
5 75 days before trial.

6 All parties' rebuttal expert disclosures and any
7 motions in limine challenging the qualifications or scope of
8 testimony of any initial expert disclosures due 50 days
9 before trial.

10 Deadline to file motions in limine challenging the
11 qualifications or scope of testimony of any rebuttal expert
12 due 25 days before trial."

13 Government, I assume the government is on board
14 since you sent me the e-mail.

15 MS. SERTICH: Correct, Your Honor. Thank you.

16 THE COURT: Okay. And why don't we change it up a
17 little bit. Mr. Gray, are you and Mr. Lane good with that
18 schedule?

19 MR. GRAY: Yes, Your Honor. We're agreeable to
20 it.

21 THE COURT: Okay. And, Mr. Plunkett, for Mr.
22 Kueng?

23 MR. PLUNKETT: Yes, Your Honor. We are in
24 agreement.

25 THE COURT: And Mr. Paule for Mr. Thao?

1 MR. PAULE: Yes, Your Honor, we are in agreement
2 with that as well.

3 THE COURT: Okay. And, Mr. Nelson, for
4 Mr. Chauvin?

5 MR. NELSON: Yes, Your Honor. We are in agreement
6 with the proposed time line.

7 THE COURT: Okay. We'll note that the parties are
8 stipulating to that proposal, and the Court will take it
9 under advisement for consideration, and the Court
10 appreciates the followup by the attorneys after the
11 suggestion by the Court. So thanks, everyone, for doing
12 that.

13 I'll assume that with that, that takes care of
14 that motion, unless there's anything else further from
15 anyone. Government?

16 MS. SERTICH: Nothing at this time, Your Honor,
17 thank you.

18 THE COURT: If any of the defense counsel want to
19 add anything, just speak up.

20 MR. NELSON: Nothing further from Mr. Chauvin.

21 THE COURT: Okay. All right. Not hearing
22 anything else then we'll move on.

23 By the way, how many experts are we talking about
24 because in essence these qualification motions, you know,
25 I'll just call them Daubert motions are relatively rare in

1 criminal cases. I think I've had experts over the years on
2 DNA, ballistics, blood splatter, cause of death and some
3 other topics. How many experts are we expecting in this
4 case? Government, I'll start with you.

5 MS. SERTICH: Your Honor, we haven't made any
6 final determination yet on experts, but we expect to present
7 expert testimony at a minimum on some medical issues and
8 possibly relating to use of force, and I'm not sure of the
9 number at this time.

10 THE COURT: Okay. Thank you, Government. And,
11 Mr. Nelson, I'll just ask you, it's not a demand by the
12 Court, but if you're comfortable giving some heads up for
13 the Court, that would be appreciated, but it's really I'll
14 leave it up to defense counsel how you want to respond to my
15 question.

16 MR. NELSON: Certainly, Your Honor. Your Honor, I
17 would anticipate medical expert as well as use of force
18 experts.

19 THE COURT: Okay. Mr. Paule, again, the same I'm
20 not demanding it, to the extent you're comfortable giving
21 the Court a heads up.

22 MR. PAULE: Thank you, Your Honor. We are
23 likewise expecting both medical expert testimony as well as
24 testimony on a use of force expert.

25 THE COURT: Okay, same procedure question to you,

1 Mr. Plunkett.

2 MR. PLUNKETT: Thank you, Your Honor. We do
3 anticipate a use of force expert testimony and there --

4 THE COURT: You're breaking up, you might have to
5 get closer to the mic. I can't hear you, Mr. Plunkett.

6 MR. PLUNKETT: My apologies, Your Honor. Can you
7 hear me better now?

8 THE COURT: Yes.

9 MR. PLUNKETT: Thank you. We anticipate having a
10 use of force expert testimony, and there's a potential for
11 medical testimony, but we have not identified those experts
12 at this time or the number of experts.

13 THE COURT: Very well. And same procedure and
14 question to you, Mr. Gray.

15 MR. GRAY: Yes, we will have at least one expert,
16 probably more, but we have one for sure.

17 THE COURT: Okay. Very well. Thank you.

18 Okay, and I just ask the other defendants for your
19 patience. We'll start with the criminal motions for
20 Mr. Chauvin, who is Defendant No. 1 in this case. I'm just
21 going to go through the ECF numbers here, and ECF No. 51,
22 Government's Motion for Discovery Pursuant to Federal Rules
23 of Criminal Procedure, 16(b), 12.1, 12.2, 12.3 and 26.2.

24 Mr. Nelson, any objections to the Government's
25 requests?

1 MR. NELSON: No objections, Your Honor.

2 THE COURT: Anything else from the Government?

3 MS. SERTICH: No, Your Honor.

4 THE COURT: Okay. Moving on to ECF No. 92,

5 Defendant's Pretrial Motion for Disclosure of 404(b)

6 Evidence. Defendant asks for immediate disclosure of this

7 evidence and the Government proposes providing the

8 Rule 404(b) notice and evidence 30 days before trial.

9 Is there any agreement on this one, folks, Ms.

10 Sertich or Mr. Nelson?

11 MR. NELSON: Your Honor, I would agree with the

12 Government's proposal of 30 days prior to trial.

13 THE COURT: Okay. Government, anything else from

14 you?

15 MS. SERTICH: No, Your Honor.

16 THE COURT: Okay. ECF No. 93, Defendant's

17 Pretrial Motion to Compel Attorney for Government to

18 Disclose Evidence Favorable to the Defendant, anything

19 further on this motion, Mr. Nelson?

20 MR. NELSON: No, Your Honor. I rely on the

21 written motion and would note that the Government has been

22 providing discovery as required.

23 THE COURT: Thank you. Ms. Sertich or Ms. Trepel?

24 MS. SERTICH: Nothing more. Thank you.

25 THE COURT: And ECF No. 94, Defendant's Pretrial

1 Motion for Disclosure of Grand Jury Minutes and Transcript,
2 anything further on this one, Mr. Nelson?

3 MR. NELSON: Nothing further. I note that the
4 Government has been providing transcripts for us.

5 THE COURT: Ms. Sertich or Ms. Trepel?

6 MS. SERTICH: Nothing further, Your Honor.

7 THE COURT: ECF No. 95 is Defendant's Pretrial
8 Motion for Early Disclosure of Jencks Act Material.
9 Mr. Nelson, on page 1 of your motion, you state that you are
10 requesting an order requiring the Government to disclose
11 Jencks Act materials I think at least two weeks prior to the
12 commencement of trial. On page 2 of your motion, you state
13 that you are requesting an order requiring the government to
14 disclose Jencks Act materials at least one month prior to
15 the testimony of each government witness. Can you clarify
16 that for the Court, please?

17 MR. NELSON: My apologies, Your Honor. I would
18 ask for one month.

19 THE COURT: Okay, 30 days is fair?

20 MR. NELSON: Yes.

21 THE COURT: So the request is for 30 days. Now,
22 the Government is proposing that you reach a reciprocal
23 disclosure date at a later time.

24 Ms. Sertich, I'm not sure why we can't address
25 that today.

1 MS. SERTICH: Thank you, Your Honor. The
2 Government has already provided a significant volume of
3 Jencks Act materials to the defense in this case, and the
4 Government agrees to meet and confer about a deadline for
5 future with defense counsel but objects to any Court Order
6 out of the proceedings today.

7 THE COURT: Okay. Mr. Nelson, any response to the
8 Government?

9 MR. NELSON: Your Honor, I leave it to the Court's
10 discretion.

11 THE COURT: Okay. Very well. Thank you.

12 ECF No. 96 is Defendant's Pretrial Motion for a
13 List of Government Witnesses. Mr. Nelson, you propose that
14 a witness list of case in chief and rebuttal witnesses,
15 which would include witnesses' addresses, be disclosed no
16 later than one month before trial.

17 The Government instead proposes to provide a
18 potential witness list of case in chief witnesses at least
19 30 days prior to trial and explicitly asks that a similar
20 and reciprocal disclosure obligation be ordered.

21 Any agreement on the scope, which is which
22 witnesses need be included and what information about the
23 witnesses needs to be included in disclosure?

24 MR. NELSON: Your Honor, we have not reached any
25 agreement relevant to that, but we would certainly request

1 the file is at least 30 days prior to trial as the
2 Government proposes, but we can work together also to
3 identify the scope --

4 (Inaudible background noise)

5 THE COURT: We're breaking up here, you might have
6 to repeat some of that.

7 (Inaudible background noise)

8 THE COURT: So, Mr. Chauvin, because there's a lot
9 of background noise from your location, we muted you from
10 our side. That is certainly not intended to prevent you
11 from communicating with us but merely to prevent the
12 background noise from interfering with the rest of the
13 hearing.

14 If at any point you need anything, could you wave,
15 catch my attention or someone in the Court here will, you
16 know, with luck see you are waving and then that way, you
17 know, we know that you want to communicate. And I remind
18 you also, Mr. Chauvin, that you have the ability to ask for
19 a breakout room at any point to talk to Mr. Nelson about
20 anything related to this matter, and when you make that
21 request, we can create a private breakout room for you and
22 your attorney Mr. Nelson to communicate just between the two
23 of you.

24 So I just want you to if you could hear that and
25 understand that, if you could maybe give a thumbs up,

1 Mr. Chauvin. Okay, thank you. All right.

2 MR. NELSON: Thank you.

3 THE COURT: Mr. Nelson, you might have to go back.
4 We couldn't pick up that last part because of the background
5 noise.

6 MR. NELSON: Understood, Your Honor.

7 Your Honor, I again would obviously ask for the
8 Government to produce its witness list 30 days prior to
9 trial, particularly the witnesses it intends to call in its
10 case in chief. I have no objection to a reciprocal
11 disclosure requirement. And in terms of whether addresses
12 need to be included, I'm willing to work with the Government
13 to identify whether there are any issues in that regard.

14 THE COURT: Okay. Thank you.

15 Ms. Sertich, anything else on that?

16 MS. SERTICH: Yes, Your Honor. As noted in the
17 Government's response, we also agree with a 30-day deadline
18 to make those disclosures. As to the scope, the government
19 would advocate for those disclosures 30 days before to be
20 for witnesses to be called in the Government's case in
21 chief, and also consistent with the practice in this
22 district we typically don't provide addresses, but we will
23 work with Mr. Nelson to provide appropriate notice.

24 THE COURT: Very well. Thank you. Let's move on
25 then to ECF No. 97, Defendant's Pretrial Motion for

1 Discovery and Inspection. I believe we've already covered
2 the expert witness disclosure issue with the Joint Motion
3 for Expert Discovery or Expert Disclosure, I apologize, in
4 ECF No. 91. Anything further on ECF No. 97?

5 MR. NELSON: No, Your Honor.

6 THE COURT: Okay. Ms. Sertich?

7 MS. SERTICH: No, Your Honor.

8 THE COURT: Okay. ECF No. 98, Defendant's
9 Pretrial Motion for Discovery and Inspection of Expert
10 Witness Testimony. Okay, and I think we've already covered
11 this with the Joint Motion for Expert Disclosure.
12 Mr. Nelson, given the joint motion, is this motion moot
13 then?

14 MR. NELSON: Yes, Your Honor, I would agree with
15 that.

16 THE COURT: Government?

17 MS. SERTICH: Agreed, Your Honor.

18 THE COURT: Okay. All right. We'll find that
19 moot.

20 ECF No. 99, Defendant's Pretrial Motion for
21 Government's Agents to Retain Rough Notes. Anything
22 further, Mr. Nelson, on this one?

23 MR. NELSON: No, Your Honor.

24 THE COURT: Government?

25 MS. SERTICH: Nothing beyond what's in our written

1 submission. Thank you.

2 THE COURT: All right. Thank you.

3 ECF No. 100, Defendant's Pretrial Motion for
4 Discovery and Inspection of All Electronic Surveillance.
5 The Government states that it is not aware of the use of any
6 electronic surveillance used in connection with the
7 investigation of any defendant concerning the current
8 charges, particularly regarding wiretapping, GPS
9 surveillance, radio transmission intercept, triggerfish, or
10 other means of electronic surveillance.

11 Mr. Nelson, is this motion moot too?

12 MR. NELSON: It is, Your Honor.

13 THE COURT: Government, anything further from your
14 side?

15 MS. SERTICH: No. Thank you.

16 THE COURT: All right. And then ECF No. 101,
17 Mr. Chauvin's Pretrial Motion for Participation by Counsel
18 in Voir Dire. Mr. Nelson, anything further on this one?

19 MR. NELSON: No, Your Honor.

20 THE COURT: Ms. Sertich?

21 MS. SERTICH: No, Your Honor.

22 THE COURT: Okay. Thank you.

23 All right. Mr. Paule, you and Mr. Thao are next.
24 I'll obviously go through the same procedure and again thank
25 everyone for your patience, but I think it's a lot easier

1 for the Court to keep track of these 40 or some motions.

2 ECF No. 41, Government's Motion for Discovery
3 Pursuant to Federal Rules of Civil Procedure 16(b), 12.1,
4 12.2, 12.3, and 26.2. Mr. Paule, any objections to the
5 Government's requests?

6 MR. PAULE: No, Your Honor.

7 THE COURT: ECF No. 72, Motion for Discovery and
8 Inspection. Anything further on this motion?

9 MR. PAULE: No, Your Honor. Although, I would
10 note as Mr. Nelson did, that we've been provided significant
11 discovery by the Government.

12 THE COURT: Ms. Sertich?

13 MS. SERTICH: Nothing further, Your Honor.

14 THE COURT: And ECF No. 73 is Mr. Thao's Motion
15 for Government Agents to Retain Their Rough Notes. Anything
16 further, Mr. Paule, on this one?

17 MR. PAULE: No, Your Honor.

18 THE COURT: Government?

19 MS. SERTICH: No, Your Honor.

20 THE COURT: ECF No. 74, Motion for Discovery and
21 Inspection of Expert Witness Testimony. I believe we've
22 already covered the expert witness disclosure with the Joint
23 Motion for Expert Disclosure on ECF No. 91. Mr. Paule,
24 given the joint motion, is ECF 74 moot?

25 MR. PAULE: I believe so, Your Honor.

1 THE COURT: Okay. Ms. Sertich, anything else?

2 MS. SERTICH: No, agreed, Your Honor.

3 THE COURT: ECF No. 75 is Mr. Thao's Motion for
4 Disclosure of Evidence Favorable to him. Anything further
5 on this motion, Mr. Paule?

6 MR. PAULE: No, Your Honor.

7 THE COURT: Ms. Sertich?

8 MS. SERTICH: No, Your Honor.

9 THE COURT: ECF No. 76, Motion for Disclosure of
10 404(b) evidence, the defendant requests 404(b) evidence
11 disclosures, but it does not propose a disclosure date. The
12 Government proposes providing the Rule 404(b) notice and
13 evidence 30 days before trial. Mr. Paule, any agreement on
14 the 30 days?

15 MR. PAULE: I would agree to that, Your Honor.

16 THE COURT: Anything further, Mr. Paule, on that
17 one?

18 MR. PAULE: No. Thank you.

19 THE COURT: Ms. Sertich?

20 MS. SERTICH: No, Your Honor.

21 THE COURT: ECF No. 77 is Mr. Thao's Motion for
22 Discovery and Inspection of Records of All Electronic
23 Surveillance. Again, the Government states that it's not
24 aware of the use of any electronic surveillance in
25 connection with the investigation of any defendant

1 concerning the current charges, particularly any wiretaps,
2 GPS surveillance, radio transmission intercepts, triggerfish
3 or other means of electronic surveillance.

4 Mr. Paule, does this moot the motion here?

5 MR. PAULE: Yes, Your Honor.

6 THE COURT: All right. Ms. Sertich, anything else
7 on that?

8 MS. SERTICH: No, Your Honor.

9 THE COURT: And ECF No. 78 is Motion for
10 Severance. We will address this issue later in the hearing,
11 so we'll reserve that one for oral argument and that's the
12 one where I think we'll just have all the lawyers, whoever
13 has a part in that motion, we'll have you argue that
14 together later on after we go through all of these motions
15 here.

16 ECF No. 79, Motion for Disclosure of Government
17 Witness List. Mr. Paule, you proposed that a list of case
18 in chief and rebuttal witnesses, which would include
19 addresses of the witnesses be disclosed no later than six
20 months before trial. Government instead proposes provide a
21 potential witness list of case in chief witnesses at least
22 30 days prior to trial and explicitly asked that a similar
23 and reciprocal disclosure obligation be ordered. Any
24 agreement on the scope such as which witnesses and what
25 information about the witnesses needs to be disclosed, Mr.

1 Paule?

2 MR. PAULE: Your Honor, I would agree that we
3 don't need the witnesses' addresses. I can speak to the
4 Government. I believe we can reach an agreement as to how
5 we're going to be able to locate these people, but I would
6 note that this is probably going to be a large number of
7 witnesses called in this case, presumably more than in most
8 cases I've had, which is why I've asked for that lengthy
9 time frame. Other than that, I don't have anything further.

10 THE COURT: Okay. And you'll work with
11 Ms. Sertich on trying to come to some type of agreement on
12 the kind of information needed?

13 MR. PAULE: We certainly will, Your Honor.

14 THE COURT: Ms. Sertich, anything else on that
15 point?

16 MS. SERTICH: No, Your Honor, just the same
17 limitations as we mentioned with respect to Defendant
18 Chauvin.

19 THE COURT: Okay. Any agreement on reciprocal
20 disclosure of witnesses? Mr. Paule?

21 MR. PAULE: Your Honor, we would be fine with
22 that.

23 THE COURT: Ms. Sertich, anything else?

24 MS. SERTICH: No, thank you, Your Honor.

25 THE COURT: All right. With respect to ECF 79, I

1 think that covers the items I had on my list. Anything
2 further from you, Mr. Paule?

3 MR. PAULE: Nothing at this point, Your Honor.
4 Thank you.

5 THE COURT: Ms. Sertich?

6 MS. SERTICH: No, Your Honor. Thank you.

7 THE COURT: ECF No. 80 is Motion for Early
8 Disclosure of Jencks Act Materials. Mr. Paule, you are
9 requesting an order requiring the Government to disclose
10 Jencks Act materials 30 days prior to trial. The Government
11 instead proposes that the parties will reach an agreement
12 for reciprocal disclosures at a later date.

13 Government, I think I posed the question to you
14 earlier the same question, can we get some sort of
15 agreement? If we can't, when will we?

16 MS. SERTICH: Thank you, Your Honor. The
17 Government will work with defense counsel to reach an
18 agreement. As I've noted earlier, we've already made a
19 significant volume of Jencks Act disclosures, but we just
20 object to an order at this time.

21 THE COURT: Okay. Mr. Paule, anything further on
22 that one?

23 MR. PAULE: Your Honor, I think that Ms. Sertich
24 and the Court's suggestion is fine. We will work together.
25 If we have an issue, we can bring it to the Court's

1 attention, but they have been provided, as Ms. Sertich sent
2 us a significant amount of material.

3 THE COURT: Okay, all right, thank you.

4 Okay, ECF No. 81 is Mr. Thao's Motion for Giglio
5 Material. Anything further on this motion, Mr. Paule?

6 MR. PAULE: No, Your Honor.

7 THE COURT: Ms. Sertich?

8 MS. SERTICH: No, Your Honor.

9 THE COURT: And ECF 82 is Mr. Thao's Motion for
10 Disclosure of Grand Jury Transcripts. Anything further on
11 this motion, Mr. Paule?

12 MR. PAULE: No, although the Government has
13 provided a significant amount of Grand Jury transcripts at
14 this point already.

15 THE COURT: Okay. Ms. Sertich?

16 MS. SERTICH: Nothing further, Your Honor.

17 THE COURT: Thank you. ECF No. 83 is a motion, is
18 Mr. Thao's Motion for a Bill of Particulars.

19 Mr. Paule, what are your specific arguments on the
20 basis for relief under Rule 7 as well as the sufficiency or
21 insufficiency of the indictment?

22 MR. PAULE: Just a second, Your Honor.

23 THE COURT: Sure, take your time.

24 There's a lot of motions I have yet to find the
25 right papers. And, obviously, Government and Ms. Sertich,

1 I'll be asking for a response afterwards so you might want
2 to start searching on your notes, too.

3 MR. PAULE: Your Honor, if I may?

4 THE COURT: Yes.

5 MR. PAULE: I would point out that there is some
6 specificity in the indictment with regards to my client's
7 action. However, I did request in my motion, I requested
8 specific notice on how my client's particular actions acted
9 to deprive Mr. Floyd of his right to be free and how his
10 actions contributed to the bodily injury or death of
11 Mr. Floyd with regard to Count II.

12 With regard to Count III, the same issue would be
13 as how did my client willfully fail to aid Mr. Floyd or how
14 did we specifically -- as to what substantial risk of harm
15 to Mr. Floyd that my client did ignore? I do note that the
16 Government put in specific actions if my client, but I think
17 my notice is required -- we're required to make this notice
18 under the existing case law regarding those two specific
19 acts with regards to Counts II and III for my client.

20 THE COURT: Yeah, and obviously defense has to
21 file whatever motions you deem would be appropriate. Okay.

22 Ms. Sertich, anything else on that?

23 MS. SERTICH: Your Honor, as stated in the
24 response to this motion, the indictment itself answers the
25 questions posed by Thao in his motion, mainly, that he

1 willfully failed to intervene to stop co-defendant Chauvin's
2 use of unreasonable force, which force is described in the
3 indictment, and that Defendant Thao saw Mr. Floyd lying on
4 the ground and in clear need of medical care and willfully
5 failed to aid Mr. Floyd, and that not only was there a
6 substantial risk of harm to Mr. Floyd, that he was in fact
7 harmed by way of both bodily injury and death. Nothing
8 further beyond that.

9 THE COURT: Okay. Let's move on to ECF No. 84,
10 Motion for Disclosure of Post-Conspiracy Statements of
11 Co-Defendants. In its consolidated response, the Government
12 states it will provide 14 days prior to trial, reports
13 detailing any post-arrest statements made by defendants that
14 it intends to introduce in its case in chief, as well as
15 statements of unindicted co-conspirators, if the government
16 plans on calling such witnesses.

17 Mr. Paule, does this sufficiently respond to your
18 motion?

19 MR. PAULE: It does, Your Honor.

20 THE COURT: And anything further on this motion,
21 Mr. Paule?

22 MR. PAULE: No. Thank you, Your Honor.

23 THE COURT: All right. Very well. Government,
24 Ms. Sertich?

25 MS. SERTICH: Nothing further, Your Honor.

1 THE COURT: Okay. Mr. Thao's motion in ECF No. 85
2 is Motion for Participation by Counsel in Voir Dire.
3 Anything further on this, Mr. Paule?

4 MR. PAULE: No. Thank you, Your Honor.

5 THE COURT: Ms. Sertich, for the Government?

6 MS. SERTICH: Nothing further, Your Honor.

7 THE COURT: Okay. Thank you, Mr. Paule and Mr.
8 Thao.

9 I will turn now to Mr. Kueng, you and
10 Mr. Plunkett. And Mr. Kueng is Defendant No. 3 in this
11 case.

12 ECF No. 42 is Mr. Kueng's or actually it's the
13 Government's motion, I apologize, for Discovery Pursuant to
14 Federal Rules of Civil Procedure 16(b), 12.1, 12.2, 12.3 and
15 26.2. Mr. Plunkett, any objections to the Government's
16 requests?

17 MR. PLUNKETT: No, Your Honor.

18 THE COURT: Government, anything further?

19 MS. SERTICH: No, Your Honor.

20 THE COURT: ECF No. 62 is Mr. Kueng's Pretrial
21 Motion for List of Government Witnesses.

22 Mr. Plunkett, do you propose that a witness list
23 of case in chief and rebuttal witnesses, which would include
24 witnesses' addresses, be disclosed no later than one month
25 before trial? The Government instead proposes to provide a

1 potential witness list of chief witnesses, case-in-chief
2 witnesses at least 30 days prior to trial and explicitly ask
3 that a similar and reciprocal disclosure obligation be
4 ordered.

5 Any agreement on the scope of this? That is which
6 witnesses need to be included, and what information about
7 the witnesses needs to be included in any disclosure?
8 Mr. Plunkett?

9 MR. PLUNKETT: We don't have an agreement as to
10 the scope at this point but certainly I can work with the
11 Government to come to a reasonable conclusion on that
12 assuming that there's an order that disclosure should be
13 made in 30 days versus one month. Thirty days is fine with
14 me.

15 THE COURT: Okay. And what about the
16 reciprocity request of the government, Mr. Plunkett?

17 MR. PLUNKETT: I agree to a reciprocal aspect to
18 that order just noting for the Court, for the record, that
19 because the defense goes second, that if something comes up
20 during trial that wasn't anticipated, we would respectfully
21 note that we wouldn't be able to comply in that regard.

22 THE COURT: Okay. Ms. Sertich, anything?

23 MS. SERTICH: That sounds reasonable, Your Honor,
24 and the Government would again argue that the order only be
25 as to the Government's witnesses for the case in chief and

1 consistent with the practice in the district not require
2 addresses but that we will work with defense counsel on that
3 type of information.

4 THE COURT: Okay. All right.

5 ECF No. 63, Mr. Kueng's Pretrial Motion for
6 Pretrial Disclosure of Rule 404 Evidence. Defendant asks
7 for immediate disclosure of this evidence, and the
8 Government proposes providing Rule 404(b) notice and
9 evidence 30 days before trial. Any agreement on this one,
10 Mr. Plunkett?

11 MR. PLUNKETT: Thirty days is acceptable, Your
12 Honor.

13 THE COURT: Anything further from your side,
14 Mr. Plunkett?

15 MR. PLUNKETT: Nothing further, Your Honor.

16 THE COURT: Okay. Government, anything else on
17 your end?

18 MS. SERTICH: No, Your Honor. Thank you.

19 THE COURT: ECF No. 64 is Defendant's Pretrial
20 Motion for Disclosure of Grand Jury Minutes and Transcript.
21 Anything further on behalf of Mr. Kueng, Mr. Plunkett?

22 MR. PLUNKETT: No, Your Honor.

23 THE COURT: Ms. Sertich for Government?

24 MS. SERTICH: No, Your Honor.

25 THE COURT: Okay. ECF No. 65 is Mr. Kueng's

1 Pretrial Motion for Early Disclosure of Jencks Act
2 Materials. Mr. Plunkett, you are requesting an order
3 requiring the Government to disclose Jencks Act materials at
4 least one month before trial. The Government instead
5 proposes that the parties will reach an agreement for
6 reciprocal disclosures at a later date.

7 Again, Ms. Sertich, any additional -- well, for
8 the record, why don't you respond to Mr. Kueng's motion
9 here.

10 MS. SERTICH: Certainly, Your Honor. The
11 Government has already provided a significant volume of
12 Jencks Act materials to the defendant in this case, and the
13 Government believes we will be able to meet with defense
14 counsel and reach an agreement on further Jencks Act
15 materials. However, the government objects to a Court order
16 at this time.

17 THE COURT: Anything else from the Government
18 before I turn it back over to Mr. Plunkett?

19 MS. SERTICH: No, thank you.

20 THE COURT: All right. Mr. Plunkett, anything
21 else?

22 MR. PLUNKETT: Thank you, Your Honor. I would
23 point out that I think that Ms. Sertich is absolutely
24 operating in good faith on this motion and has a history of
25 doing that throughout the entire time I've ever worked with

1 her, but I would still like to have a deadline of one month
2 or 30 days before trial because of the volume of information
3 that we've already received and the difficulties that would
4 be posed responding to or adjusting our strategies in our
5 trial if it's later than that. So I'm sure that we'll work
6 together and probably won't have a problem, but I would
7 still like to have a deadline.

8 THE COURT: Ms. Sertich, Mr. Plunkett is basically
9 saying there's a lot of discovery.

10 MS. SERTICH: It's true, Your Honor, and he has
11 the Jencks Act materials, most of which he has to date, so I
12 feel confident, as he said, that we can talk about this
13 going forward and reach an agreement that's reasonable.

14 THE COURT: All right. Okay. Thank you.

15 ECF 66 is Mr. Kueng's Motion for Brady Materials.
16 Anything further on this one, Mr. Plunkett?

17 MR. PLUNKETT: No, Your Honor.

18 THE COURT: Government?

19 MS. SERTICH: No, Your Honor.

20 THE COURT: Then moving on to ECF No. 67, which is
21 Mr. Kueng's Motion for Disclosure of Giglio Material.
22 Anything further from defense on this one?

23 MR. PLUNKETT: Nothing further, Your Honor.

24 THE COURT: And from the Government?

25 MS. SERTICH: No, Your Honor.

1 THE COURT: Next, ECF No. 68, is Mr. Kueng's
2 Pretrial Motion for Discovery and Inspection. Anything
3 further on this motion, Mr. Plunkett?

4 MR. PLUNKETT: Nothing further, Your Honor.

5 THE COURT: Ms. Sertich?

6 MS. SERTICH: Nothing further, Your Honor.

7 THE COURT: ECF No. 69 is Mr. Kueng's Pretrial
8 Motion for Severance of Mr. Chauvin. Again, we'll have oral
9 arguments in a moment here on this, and so we'll save
10 additional discussions, arguments and record making for that
11 time. So we'll reserve 69, for now anyways.

12 ECF No. 70, Mr. Plunkett, is a Motion to Strike
13 Surplusage. Mr. Plunkett, the Court sees that you filed a
14 memorandum in support of this motion in ECF No. 87. This is
15 a motion I don't see filed very often. Could you elaborate
16 a little bit more for me, please?

17 MR. PLUNKETT: I can, Your Honor, but I would also
18 point out that Mr. Gray on behalf of Mr. Lane filed, well,
19 it's not an identical motion and memorandum, it's on the
20 same issue, and to be respectful of court time, Mr. Gray and
21 I had talked about him arguing that motion, and I would
22 adopt his arguments. I think that the motion and memorandum
23 are fairly straightforward as is the rule and particulars of
24 this case are similar or even identical between Mr. Kueng
25 and Mr. Lane, so I would adopt the future argument of

1 Mr. Gray.

2 THE COURT: And that will be fine. And once we
3 get to Mr. Gray, once he makes his arguments, then,
4 obviously, at that point if you needed to add to that, you
5 would have the opportunity to do that and having worked with
6 all of you over the years, I'm sure you won't go over things
7 that Mr. Gray already argued, and so I'll note that, but
8 catch my attention though because if I'm focusing on the
9 arguments between Mr. Gray and Ms. Sertich, I might
10 accidentally forget that you want to, you might want to
11 participate in that argument, so just get my attention.

12 MR. PLUNKETT: Will do, Your Honor.

13 THE COURT: Okay. Then the Government we'll just
14 reserve this for later on, and you can argue with Mr. Gray.

15 MS. SERTICH: Thank you.

16 THE COURT: All right. With that then, I believe
17 we can move on to the motions for Mr. Lane. And Mr. Lane,
18 as indicated earlier, you are Defendant No. 4 in this case.
19 And your ECF No. 43 relates to the Government's Motion for
20 Discovery Pursuant to Federal Rules of Criminal Procedure
21 16(b), 12.1, 12.2, 12.3 and 26.2.

22 Mr. Gray, any objections to the Government's
23 requests?

24 MR. GRAY: No, Your Honor.

25 THE COURT: Okay. ECF No. 88 is Mr. Lane's Motion

1 to Strike Surplusage. I think we counted on that earlier,
2 and Mr. Gray, the Court sees that in your filed memorandum
3 of support, that's ECF No. 89. First, the Court notes that
4 in your memorandum, you reference, "He had worked as a
5 police officer four shifts as of May 25, 2019." Is that
6 correct or is that a typo?

7 MR. GRAY: No, that's correct. And Mr. Lane is
8 here if you need testimony on that. That's when he started
9 working as a police officer. And as I stated in the memo,
10 which isn't very long, before that he was a recruit, and
11 I'll just get into my argument if you want, Your Honor.

12 THE COURT: Yeah, go ahead.

13 MR. GRAY: Okay. Well, the issue in this case,
14 the main issue in this case for Mr. Lane, and I believe for
15 the other, for Mr. Kueng also, is that they're claiming he
16 should have intervened on what Chauvin did in this case, and
17 the uniqueness of that is that Mr. Lane had four shifts as a
18 police officer, and I believe those shifts, most of them if
19 not all of them, were with Mr. Kueng. So the idea that he
20 has worked as a police officer, the indictment says he began
21 working as a, in December, he began working as an MPD
22 Officer in December 2019. That's not correct. It is not
23 necessary for the indictment, and as the Court knows, this
24 indictment, the indictment goes into the jury room with the
25 jurors in Federal Court. And according to the case I cited,

1 excuse me, State -- or excuse me, too used to State Court --
2 *U.S. v. Schuler*, 485 F.3d 1148. In that case, because the
3 defense lawyer did not object to this at the time of
4 motions, he waived his right to object to it at the time of
5 trial, and they then looked at it as plain error and not
6 within the discretion of the Court.

7 So I raise this now because it's very prejudicial
8 because of the issue in the case being intervention, and the
9 common sense dictates that a law officer that has four days
10 on the job would be less apt to intervene. And what's
11 amazing about Mr. Lane's case is that he did attempt to
12 intervene at least twice, and he also took part in
13 resuscitating Mr. Floyd.

14 In any event, getting back to this issue, the
15 statement is unnecessary for the indictment. It's wrong,
16 and it's substantially prejudicial because intervention in
17 this case is a big issue, and the individual on the job for
18 four days is not apt to intervene on the conduct of
19 Mr. Chauvin. That's all I have, Your Honor.

20 THE COURT: So just to clarify, in your memorandum
21 you reference 2019, is that supposed to be '20?

22 DEFENDANT LANE: It's December of 2019.

23 MR. GRAY: Yeah, I'm sorry. You're right, Judge.
24 It's December of --

25 THE COURT: Yeah, it's December '19 is what you're

1 asserting, but the four shifts reference is to May 25, 2020,
2 as opposed to 2019, is that correct?

3 MR. GRAY: Yes. Excuse me, Your Honor. I'm
4 getting my numbers mixed up.

5 THE COURT: No, that's fine. There's a lot of
6 numbers I'm going over here too so.

7 So curiously if the Government puts that in the
8 indictment, doesn't that just give them an additional
9 element of proof that they've got to prove beyond a
10 reasonable doubt?

11 MR. GRAY: No, because this is an intervention
12 case. That's the problem I have, and if they're looking at
13 the experience of the officers, and they can't remember it,
14 and the jury asks what was said, we have at this time at
15 least four defendants, they may look at the indictment and
16 say, well, here -- and I've experienced this before -- well,
17 here the indictment says he worked since this date, which
18 would be what, December of 2019.

19 So, no, I think it's extremely prejudicial to my
20 client, and it's surplusage. It isn't necessary to have in
21 the indictment to prove the elements that he began working
22 as a MPD officer in December of 2019, and that's why we
23 object to it, Your Honor.

24 THE COURT: Okay. Thank you.

25 Mr. Plunkett?

1 MR. PLUNKETT: Thank you, Your Honor. I did want
2 to add some factual differences between the case clarified.
3 It was Mr. Gray's client was considerably more experienced
4 as an MPD police officer than Mr. Kueng with his four days
5 of experience. Mr. Kueng actually had three days post-FTO,
6 and one of those days he worked on the desk, wasn't even on
7 the street. I think that would be a factual difference that
8 is important.

9 Beyond that, you know, I don't want to say
10 everything that Mr. Gray just said again, I just want to
11 adopt it as part of my record in Mr. Kueng's case the legal
12 arguments and point out that, which I think Mr. Gray touched
13 on, that since this is going to be a factual dispute
14 apparently in the trial, to then have the Court read it to
15 the jury, it would be quite prejudicial that the Government
16 is correct. Thank you, Your Honor.

17 THE COURT: Okay, Ms. Sertich?

18 MS. SERTICH: Thank you, Your Honor. As noted in
19 our response, the Court can strike surplusage pursuant to
20 Rule 7(d) but only where the language is not relevant to the
21 charge made or contains inflammatory and prejudicial matter.

22 I would like to start with just a couple
23 clarifications, and the first of those is that Defendant
24 Lane is not charged in Count II of the indictment at this
25 time with failure to intervene. So the arguments about

1 intervention aren't applicable in the same way to Mr. Lane
2 as they are to Mr. Kueng at this time.

3 Remarkably, Mr. Kueng admits in his memorandum
4 that technically speaking he was a police officer. I would
5 proffer to the Court that these dates come from records
6 provided by the MPD that set forth these former officers'
7 rank histories, both of which state that both former
8 officers were police officers as of December 10, 2019. To
9 the extent that Mr. Plunkett and Mr. Gray want to refer to
10 them as recruits, they actually were designated as recruits
11 from August 14th of 2019 through December of 2019. So these
12 accurate and factual dates of employment, it is hard to see
13 how there can be an argument made that that information is
14 inflammatory or unfairly prejudicial.

15 THE COURT: Ms. Sertich, what is the basis of the
16 distinction then between a recruit and becoming an officer?
17 Is there a document that says I am now or you are now an
18 officer as of today? What's the basis of that?

19 MS. SERTICH: Your Honor, I'm just going to give
20 you my understanding that I believe they are sworn in as
21 officers at a particular time, and to say that they only had
22 these three or four shifts, that would be beyond their field
23 training. So they had been on numerous calls between
24 December of 2019 and May of 2020, just under a different
25 designation not on their field training but on their own.

1 Do you want me to address that question further or
2 should I --

3 THE COURT: Yeah.

4 MS. SERTICH: Or do you want me to keep going with
5 the argument, sorry?

6 THE COURT: It's your response. You can choose.

7 MS. SERTICH: Okay. Further, I don't believe I've
8 ever had a case in this district where there hasn't been an
9 instruction to the jury that the indictment only contains
10 allegations and not facts. They should not be accepted as
11 facts by the jury, and so I think such an instruction would
12 cure the concerns that Mr. Plunkett and Mr. Gray raised.

13 And, finally, these challenge statements are
14 relevant to the charges against the defendants because they
15 could go to the willfulness of the former officers in that
16 they intentionally committed the Constitutional violations
17 knowing that a reasonable officer would not have engaged in
18 those Constitutional violations, and that is more
19 specifically described in the Government's response to the
20 motions. Thank you.

21 THE COURT: Okay.

22 MR. GRAY: Your Honor, can I be heard?

23 THE COURT: Yes. Mr. Gray?

24 MR. GRAY: Okay. With respect to her first
25 argument, if you read Count III, it is intervention. It

1 says that my client willfully failed to aid Floyd thereby
2 acting with deliberate indifference. If he willfully failed
3 to aid him, that's the same as intervention. It's just
4 different wording. So he is charged with willfully failing
5 to aid Floyd. He had four days of being a police officer on
6 his own. Before that, he was subject to a field training
7 officer, and he was known as a recruit. That's important in
8 our defense, Your Honor.

9 And why do they want this in the indictment if
10 it's not part of the elements? When they say that he was
11 eight -- what is that, December of 2019, it says that he was
12 employed as a Minneapolis Police Department Officer. He
13 wasn't and that's not accurate and it's prejudicial because
14 the jury will have this indictment, even though it's not
15 evidence, jurors will rely on that to look at the elements.
16 And when they look at the elements of this indictment, they
17 will read that he began working as a police officer on
18 December 29th, which is false evidence and is prejudicial to
19 my client's case because in reality, he had been on his own
20 as a police officer for four days, substantially longer than
21 Mr. Kueng, which was three days.

22 So, Judge, I believe why would they resist taking
23 something out that isn't true? Why is the Government
24 resisting that? Why don't they put in there that he has
25 been on his own for four days if they need it because that's

1 accurate or put in there that he was a recruit starting in
2 December.

3 THE COURT: Mr. Gray, how do you respond to that
4 comment, I believe it was a comment, I don't think it was
5 assertion of fact. Ms. Sertich, when I asked the question,
6 well, how do you distinguish your recruit versus becoming an
7 officer, and she made reference to, well, you're sworn in
8 and then you're, in essence, that's how I interpreted your
9 response, Ms. Sertich, is when you're sworn in, you take an
10 oath then you become an officer at that time, I think, was
11 the end that that -- when was that oath? That should be
12 just a simple factual matter that people should be able to
13 figure out, right?

14 MR. GRAY: Yes, I respond to it by saying he did
15 take the oath in 2019. However, he was not on his own, and
16 by that I mean making decisions on his own until four days
17 before the incident on May 25th. So he was sworn in as a
18 police officer maybe, but he wasn't a police officer until
19 four shifts as of May 25th.

20 THE COURT: Okay. All right.

21 MR. GRAY: That's when he was on his own, Judge.
22 Before that they have field training officers. They have
23 people under their control. Everything they do is
24 monitored. Everything. Not until they get into a car like
25 in this case with Mr. Kueng and Mr. Lane are on their own as

1 police officers and, therefore, the idea that he began
2 working as a Minneapolis police officer in December 2, 2019,
3 it's wrong. That's all I have.

4 THE COURT: Okay. Thank you. Mr. Plunkett?

5 MR. PLUNKETT: Thank you, Your Honor. I would
6 just add to the facts on this. If you look at that December
7 date that that's not even when they began the FTO. At that
8 point in time, both of these actual officers were in the
9 academy. They weren't even wearing police officer uniforms.
10 I think they were wearing some sweat suits with a pistol
11 belt, and they were taking classes, and they were hopefully
12 taking in how it is that you go about being a police
13 officer, to have the indictment be read to the jury and say
14 that they were police officers at that time is very
15 inaccurate. It's prejudicial.

16 They didn't even begin their FTO until some time
17 in January, and at that point, I'm not going to reiterate
18 what FTO is because Mr. Gray has adequately explained it,
19 but it's going to be an issue in the trial, and it's just
20 very prejudicial to have that be placed in the jury's mind
21 early on and then have it read to them at the end. So
22 that's the prejudice.

23 THE COURT: So, Mr. Plunkett, you're saying that
24 Mr. Kueng was then a full-time officer in January of 2020?
25 You said January, so I just want to clarify the year that

1 you're referencing.

2 MR. PLUNKETT: Correct, December 19th is when both
3 of these persons took an oath. They were not working the
4 street at that time. They were in an academy. They were
5 essentially in law school waiting to be lawyers. They were
6 in police academy waiting to be police officers. After they
7 went on FTO, they would be tantamount to a certified student
8 attorney, and to call that person an attorney is a
9 comparison. It's fundamentally inaccurate. It's
10 prejudicial.

11 They were working under experienced officers when
12 they didn't make decisions to arrest people. They were told
13 to arrest people. There's videos where their FTOs,
14 Mr. Chauvin is present, they are told to go and chase
15 somebody down and they do. They're not asked what they
16 think. They're told do this, do that, and they're evaluated
17 on it.

18 THE COURT: Well, it's been a couple of years
19 since I've been in baby judge school, but when we're sworn
20 in, we're a judge and then we often go out to baby judge
21 school afterwards, so when you say he was sworn in in
22 December 2019, it seems like he's an officer at that time,
23 isn't he?

24 MR. PLUNKETT: Only in a very technical sense.

25 MR. GRAY: The language in the indictment is he

1 began working as a Minneapolis police officer on
2 December 2019 and that's not accurate. It just simply
3 isn't. He didn't start working as a police officer until
4 the four shifts prior to May 25th. And it's extremely
5 important, Your Honor, because when you're working as a
6 recruit, you ask an FTO or a Field Training Officer
7 questions, should I do this? Should I do that?

8 And in this case with respect to Mr. Lane, as the
9 Court probably knows, he asked to turn him over twice. He's
10 the one who asked that, and he asked before he went into the
11 ambulance. He wasn't allowed to turn him over. Lane said
12 no, but then when he went in, he asked to get into the
13 ambulance, Lane said, okay. That's evidence that they're
14 just out of recruit school, and they're still relying on a
15 field training officer, and both of these officers knew that
16 Lane, or excuse me, Chauvin was a field training officer.
17 In fact, I think Mr. Kueng, that was his field training
18 officer.

19 So it's important the language in the indictment
20 "began working as a Minneapolis police officer" is not fair,
21 is not a fair representation of what my client was doing.
22 I'm done. Thank you, Judge.

23 THE COURT: Okay. Thank you. Ms. Sertich, I'm
24 giving you the opportunity to respond at this time.

25 MS. SERTICH: Thank you, Your Honor.

1 In terms of argument, I would just again say that
2 the indictment is accurate and not prejudicial. And to
3 clear up a few points, Mr. Gray keeps referring to Mr. Lane
4 as having been a recruit up until right before these four
5 shifts that he did. But according to the Minneapolis Police
6 Department, Mr. Lane was designated as a recruit, using
7 those words, from August 14th of 2019, through December 10th
8 of 2019.

9 Now, they would have been in the academy up until
10 that date, but to be clear, they become officers at the
11 point of graduation from the academy, and they were
12 graduated from the academy and sworn in as officers as of
13 December 10, 2019. I have nothing further at this time.

14 THE COURT: Okay. All right. Anything else from
15 you, Mr. Gray, on that?

16 MR. GRAY: No, Your Honor. Just that you're under
17 the control of a police officer until four days prior to
18 May 25th and that can't be argued that they were not.
19 That's all I have.

20 THE COURT: All right. Mr. Plunkett?

21 MR. PLUNKETT: Nothing further, Your Honor.

22 THE COURT: Government in response to Mr. Gray,
23 anything?

24 MS. SERTICH: No, thank you, Your Honor.

25 THE COURT: All right. Thank you, everyone, for

1 being prepared for the argument.

2 Let's move on to ECF No. 90, and this is Motion to
3 Join Co-Defendants Pretrial Motions. Mr. Gray, you
4 indicated in a filing that you're specifically asking to
5 join Defendant Kueng's Pretrial Motion for Severance from
6 Mr. Chauvin. That's ECF No. 69. And Defendant Kueng's
7 Motion for Brady Materials, ECF No. 66; and Defendant
8 Kueng's Motion for Disclosure of Giglio Materials, ECF No.
9 67. Mr. Gray, if you could just confirm that, is that
10 correct?

11 MR. GRAY: That's correct, Your Honor. And I'm
12 not going to argue the Brady and Giglio. I just did that
13 for the record. The only argument I would make would with
14 respect would be a short argument with respect to severance,
15 which you're going to do that at the end, correct?

16 THE COURT: Yes, and I think that brings us to the
17 severance motion, actually.

18 Anything else, Ms. Sertich, on ECF No. 90? That,
19 again, is Defendant's Motion to Join Co-Defendants Pretrial
20 Motions. Anything else on that one?

21 MS. SERTICH: No, Your Honor. Thank you.

22 THE COURT: All right. Okay. Next, let's move to
23 the Motions to Sever, ECF No. 69 for Mr. Kueng and Mr. Lane,
24 and ECF No. 78 for Mr. Thao. Both of these motions state
25 separate reasons for severing Defendant Chauvin's case from

1 the respective defendant's case.

2 So before the parties make their oral arguments
3 today, the Court notes that it will be ordering further
4 briefing on these motions. Each defendant including -- oh,
5 by the way, on further briefing, I would like further
6 briefing on the last issue, too, of course, that we
7 discussed regarding the surplusage.

8 But back now to the motion to sever, each
9 defendant, including Mr. Lane, Mr. Gray, will be required to
10 submit post-hearing briefing, which states the specific
11 factual and legal bases for severing their case from
12 Defendant Chauvin's and all arguments in support of
13 severance.

14 With that, I start with you, Mr. Paule, and I
15 suppose in some ways it's apropos that you and I start this
16 dialogue regarding the severance given that I believe we
17 haven't argued this in this century anyways, and you also
18 won't have your former colleagues I believe then Public
19 Defender Moreno, Assistant Public Defender Moreno, who is
20 now Judge Moreno, and also Mr. Goetz to help you. I'm sure
21 Mr. Plunkett and Mr. Gray will be more than happy to jump
22 in.

23 So with that, I'm just going to start off, Mr.
24 Paule, unlike in Minnesota State Court, joining defendants
25 is fairly common in federal cases, and I would bet that you

1 and Mr. Plunkett and Mr. Gray have litigated dozens of joint
2 defendant cases in Federal Court. Severance is much more
3 the exception it seems to me in Federal Court, though we
4 know it does occur as evidenced by a case now in trial in
5 the Northern District of California. So why would I sever
6 this case specifically with respect to your client, Mr.
7 Thao?

8 MR. PAULE: Well, Your Honor, the rules do allow
9 the Court to sever when there is prejudice, and I would
10 point out that this case, unlike any other case I've had at
11 least in Federal Court, has the potential for grave
12 prejudice with regard to my client --

13 THE COURT: Hold on just a moment. For some
14 reason, our screen went off. It's back on, sorry.

15 Okay, I apologize. Mr. Paule, you were up. You
16 can respond to the Court's question, so please if you could
17 start, I believe you were arguing prejudice.

18 MR. PAULE: Yes, Your Honor. And with regard to
19 the specific prejudice as to my client being joined with
20 Mr. Chauvin, I think the idea is there will be much evidence
21 that will be brought into play with regard to Officer
22 Chauvin. It would not be brought into play were my client
23 to be severed off with him.

24 And I think just in terms of an evidentiary issue,
25 you've got the Spriegl, the prior incident, which is the

1 subject of a separate indictment, but my guess is the
2 Government will be trying to bring that in as 404(b)
3 evidence in this case, and I think that were my client to be
4 severed off, that would come into play.

5 I think the backdrop with regard to this case is
6 the sheer amount of publicity involving cases alleging
7 police brutality throughout the nation but, specifically,
8 with regard to this case. Additionally, there was a large
9 amount of what could be determined social unrest following
10 the incident involving Mr. Floyd that bore down on this
11 community and this district following this incident
12 occurring. And I think the fact that my client would be
13 tried with Mr. Chauvin would be prejudiced in not just in
14 the additional evidence but also the addition of just
15 societal prejudice that would be brought about with regard
16 to be tried as a separate -- with a co-defendant involving
17 Mr. Chauvin, and I think that's something that would cause
18 severe prejudice to my client. I think the jury would have
19 a difficult time sorting things out, and it's all to the
20 prejudice of my client.

21 Additionally, and this doesn't go directly to
22 Mr. Chauvin, but the Court can infer from the arguments of
23 both Mr. Plunkett and Mr. Gray, that one of the theories of
24 defense is going to be that their clients were new on the
25 job and that they were relying on the actions of their

1 senior officers.

2 As was stated in the indictment, my client was
3 employed by the MPD for a number of years prior to this
4 incident, and you can see that both the attorneys for
5 Mr. Lane and Mr. Kueng are using that to try to point out
6 that their clients were rookies and were deferring to my
7 client. This would in turn bring into play the idea that
8 there's a second prosecutor. Justice Stevens spoke about
9 this in a concurrence in *Zafiro*, and I don't know if the
10 Court has that cite. Again, I can provide that to the
11 Court.

12 THE COURT: I think I'm very familiar with *Zafiro*,
13 and believe we cited it in the last century I cited it.

14 MR. PAULE: We did, Your Honor, but I think that
15 really brings out into play something that would occur in
16 this case were my client to be joined not only with
17 Mr. Chauvin but presumably with Officers Lane and Kueng.

18 I would agree that this is, at this point, at
19 least somewhat premature, but I think the Court can sense
20 from the arguments from both Mr. Lane and Mr. Kueng that
21 their theories are going to be that their clients were
22 rookies and that they were deferring to their senior
23 officers. My client is one of those.

24 Were my client to have an individual trial, he
25 wouldn't be dealing with this and dealing with a second

1 prosecutor, and this is something I will flesh out in the
2 memo, Your Honor, but I think this case has specific
3 individual concerns that most cases don't.

4 I am familiar with the rules in Federal Court, and
5 I understand that the joinder is the norm, and it's a rare,
6 rare case where somebody is actually severed off, but I
7 think this case presents those type of prejudice, and I
8 would ask the Court to sever my client, and we will
9 obviously supplement the record with a memorandum.

10 THE COURT: Sure. Thank you.

11 Government, I'll give you more of a general
12 opportunity to respond later on after the three defendants
13 have argued, but I do want to ask you specifically on two
14 points in response to Mr. Paule's arguments. One relates to
15 his reference to the Spriegl of I believe what Mr. Paule
16 and, correct me if I'm wrong, when you referenced the
17 Spriegl with respect to Mr. Chauvin, I believe was what
18 you're alluding to with the 404(b) and the incident from
19 approximately 2017, is that what you're referencing?

20 MR. PAULE: Yes, Your Honor.

21 THE COURT: Okay. So, Ms. Sertich, in essence,
22 look, we're in a separate trial. We wouldn't have to deal
23 with the Spriegl issue from the 2017 case possibly.

24 Secondly, although, we in all fairness we don't
25 know what is going to be admitted or not at this point, so

1 and also there's a reference to, well, by Mr. Paule it's
2 pretty clear, he says look, just listen to what Mr. Lane and
3 Mr. Kueng were arguing this morning on the surplusage is
4 basically that their argument is going to be, well, they're
5 inexperienced officers, new on the job or, you know,
6 wherever that argument goes, and your client is going to be
7 an experienced officer, meaning Mr. Thao is an experienced
8 officer. Can you address those two points because they do
9 relate specifically to Mr. Thao?

10 MS. SERTICH: Yes, Your Honor. And, first, I will
11 note as referenced by Mr. Paule that the defendants agreed
12 that the motions they filed here were premature because the
13 record was insufficiently developed as to why a severance
14 from Mr. Chauvin was appropriate. And so the Government
15 will seek additional briefing as you've indicated will
16 happen, and we'll address all of this in a lot more detail.

17 As to the 404(b) incident from 2017, I'm not
18 prepared at this point to make a representation about
19 whether we would seek to introduce that evidence or not.
20 That's something that we would be a decision that would be
21 made at a later time.

22 And as to point number 2, Mr. Thao has only sought
23 severance from Mr. Chauvin, so it's unclear to me how his
24 second concern would be addressed if he was still in trial
25 with former officers Lane and Kueng.

1 THE COURT: I think that's a very fair comment,
2 Ms. Sertich. Mr. Paule? I think my recollection was the
3 severance related from Mr. Chauvin not the other two
4 defendants.

5 MR. PAULE: It does at this time, Your Honor, but
6 the idea is that if we're seeking severance, we need to
7 address the Court on this as soon as possible. Clearly,
8 they're not in trial yet. We don't know exactly what the
9 defenses are going to be, but I think it's pretty clear from
10 this argument, you can see what the alignment is in this
11 particular case that it looks like both Mr. Lane and Mr.
12 Kueng will be seeking to distinguish their clients and
13 that's a nice way of putting it from my client at least in
14 terms of experience, in terms of duty to intervene or, as
15 Mr. Gray put it -- may I have just a moment, Your Honor?
16 Hopefully failing to aid Mr. Floyd. I think it's pretty
17 clear what their arguments are going to be is, hey, look
18 we're rookie officers, and we're deferring to the senior
19 officers; and, specifically, it sounds like Mr. Kueng is
20 going to say that Officer Chauvin was his particular field
21 training officer.

22 And while my motion is specific to Mr. Chauvin at
23 this point, I think clearly the stage is set for the type of
24 antagonism that was talked about in *Zafiro*, particularly in
25 the concurrence with the second prosecutor.

1 THE COURT: Ms. Sertich, anything else on those
2 specific topics as it relates to Mr. Thao?

3 MS. SERTICH: No, thank you, Your Honor. We will
4 take the opportunity to provide further briefing once we've
5 seen Mr. Paule's briefing.

6 THE COURT: Very well. Okay.

7 Thank you. Anything else? I'm going to give all
8 the other lawyers an opportunity for their input too.

9 Mr. Paule, anything else from you on this issue?

10 MR. PAULE: I don't have anything further at this
11 point. I think briefing would be assisting everyone.

12 THE COURT: Okay. All right.

13 Mr. Plunkett, basically the same question for and
14 you and your client Mr. Kueng as I had for Mr. Paule and his
15 client Mr. Thao. So on what legal and factual basis should
16 I sever Mr. Kueng's case from Mr. Chauvin's?

17 MR. PLUNKETT: Your Honor, Mr. Paule fully
18 ventilated the answers to those questions. I would rely on
19 his arguments and adopt them as my own.

20 I would also point out that in my meet and confer,
21 I think that in meeting with the Government prior to this
22 hearing, we agreed that while they oppose this severance,
23 that a decision on severance is premature and that we'd
24 jointly ask that that this be reserved until such time as
25 it's fully ripened.

1 THE COURT: That's interesting. I mean these
2 motions have been filed and when there is filed motions, we
3 rule on them, usually decisions on severance are usually
4 without prejudice, usually. For example, if there's a
5 denial, it's without prejudice and then as items
6 materialize, there obviously can be an opportunity for
7 additional arguments usually if there's additional facts
8 that come to light. Again, that's not necessarily my
9 decision depending on when in the proceeding that will
10 occur, but it seems to me I have a motion before me, and I
11 should rule on it. So, Mr. Plunkett?

12 MR. PLUNKETT: No, I don't disagree with the Court
13 on that, Your Honor.

14 THE COURT: You have to lean in a little bit more.
15 I can't hear you.

16 MR. PLUNKETT: I don't disagree with the Court on
17 that, Your Honor. But at the same time, I did want to be
18 honest and forthcoming with the Court in saying that some of
19 the issues on severance may have to develop more in the
20 future, but it is appropriate to have the motion made now,
21 but it is, you know, the prejudice is as Mr. Paule has
22 articulated it.

23 THE COURT: Okay. Thank you. Anything else
24 before I turn it over to Mr. Gray?

25 MR. PLUNKETT: Nothing further from Mr. Kueng.

1 THE COURT: Okay.

2 All right. Mr. Gray, I bet you've been warming up
3 on the on-deck circle here, so same question in essence. On
4 what legal and factual basis should I sever your client
5 Mr. Lane from Mr. Chauvin's case?

6 MR. GRAY: Well, because it's substantially
7 prejudicial. This is a unique case. I doubt if you'll find
8 anybody in that jury panel and the jury pool I should say
9 that did not know that Derek Chauvin was convicted of
10 killing George Floyd. Now, that's substantially prejudicial
11 on this case because Derek Chauvin is charged in each and
12 every one of these three counts, and so the jury is going to
13 know that Derek Chauvin was convicted. We should be severed
14 from Derek Chauvin because we should not be saddled and
15 branded with his conviction of murder under the same facts,
16 although these are different words in this indictment, the
17 facts are going to be pretty much the same.

18 And to give you an example, if there are four
19 defendants charged in a case and they're in trial, and one
20 of them decides to plead guilty, one of them gets a
21 dismissal, gets lucky, when the other three are sitting
22 there, the Judge does not tell them anything. They're not
23 to consider that because they don't know what happened to
24 the individual.

25 Here, the jurors will know that this Chauvin guy,

1 who is sitting there with them, has already been convicted
2 of murder. And murder is the charge in each and every one
3 of these counts, so I haven't looked at the rule, but I will
4 in the briefing.

5 There's two reasons for severing, and one of them
6 is substantial prejudice. And if this isn't substantial
7 prejudice, my goodness, now, when you're reading the paper
8 after Mr. Chauvin was convicted, now they don't say
9 allegation or anything. They say George Floyd was convicted
10 of murder, and they don't separate Chauvin out of that, so
11 when that is mentioned, all four of these defendants are
12 prejudiced. In this case, we should at least not have Derek
13 Chauvin in this case for trial. Substantially prejudicial.
14 I can't imagine something more prejudicial than a juror
15 knowing that, well, one of those guys has already been
16 convicted of this, when we're all defending on the same
17 basis pretty much, especially my client. Thank you. That's
18 all I have.

19 THE COURT: So we have a relatively short temporal
20 span of this incident and seems to me isn't there a good
21 argument that that short temporal span of this incident and
22 the nature of the charges and the elements that are at issue
23 against the defendants, don't they lend themselves to a
24 joint trial because each of their separate actions or
25 inactions needs to be evaluated in the context of the

1 other's actions or inactions. And, Mr. Gray, I toss that
2 one at you, but, obviously, Mr. Paule, Mr. Plunkett can feel
3 free to jump in or you can defer, Mr. Gray, if you want.
4 It's up to you.

5 MR. GRAY: That's exactly why we need the
6 severance because his actions are going to be held against
7 us in this trial, and everybody knows that Derek Chauvin was
8 convicted of murder. So we're -- are we going to be
9 presumed innocent of this charge? I doubt it. No matter
10 what a juror says on the jury pool, they're all going to
11 know about Chauvin's conviction.

12 There's not another case that I can think of where
13 a trial like this is being held, and one of the jurors knows
14 well, he's already been convicted because the facts are the
15 same. Not the charge maybe but the charge is identical
16 because all these people are accused of causing the death of
17 George Floyd, resulted in bodily injury and the death of
18 George Floyd on each and every one of these counts, that's
19 what it says and they look right to Derek Chauvin and they
20 say, well, these guys caused the death too.

21 It would be very difficult with Chauvin in this
22 case to get a fair trial for the other three, and that's I
23 can't imagine it not being. I hope I answered your
24 question, Judge, because is that what you asked?

25 THE COURT: I think you have. But, and, again,

1 Mr. Paule and Mr. Plunkett, you can go ahead and respond
2 too. This case we have videos. We have videos that
3 captures much, if not most of the events in question, of
4 what these defendants did or didn't do to George Floyd.

5 Don't we have videos? Don't we have videos that in
6 my mind are the ineluctable modality of the visual images of
7 what happened to Mr. Floyd that needs to be viewed together
8 and weighed together and not separately?

9 MR. GRAY: But the videos, what the jurors will
10 know that one fellow out there working together has already
11 been convicted. So that, and with respect to the videos, by
12 the same the trial starts, there will be experts telling you
13 what those videos show, that's what they did in the state
14 case. Well, this shows that, that shows this. I mean the
15 videos do not make this case not severable. The Defendants
16 Lane, Kueng and Thao should have their own trial, not with
17 Derek Chauvin now that he's been convicted, because the
18 video, as I just stated, shows one picture but then we get
19 all these other experts and all these other individuals that
20 say, well, I saw this, I saw that. So the video is one part
21 of this case, but it's not all of the case. Thank you.

22 THE COURT: Thank you, Mr. Gray. Either
23 Mr. Plunkett or Mr. Paule next?

24 MR. PAULE: Your Honor, if I may, just briefly I
25 point out that I think what Mr. Gray is trying to articulate

1 is a difference between a piece of evidence in no matter
2 what format it is in versus legal conclusion because that's
3 really what we're dealing with here is asking whether or not
4 a jury can sort out my client, and I'll only speak to him
5 sitting in the same courtroom whether he's really presumed
6 to be innocent sitting across from somebody who the jury
7 will know has already been convicted of a crime in this
8 incident.

9 THE COURT: Thank you, Mr. Paule.

10 Mr. Plunkett, anything to add?

11 MR. PLUNKETT: Nothing further, Your Honor.

12 THE COURT: Okay. Very well. Thank you. Thank
13 you, gentlemen, to responding to the Court's questions and
14 being prepared for that.

15 Ms. Sertich, obviously, I'd like you to respond to
16 the arguments that have been made. And I do also want to as
17 I alluded to earlier with respect to that other case in the
18 Northern District of California, severance does occur in
19 federal criminal cases.

20 Also, the State Court severed Mr. Chauvin's case
21 from those against Messrs. Thao, Kueng and Lane, why
22 shouldn't we sever them from Mr. Chauvin in the interest of
23 justice?

24 MS. SERTICH: Thank you, Your Honor.

25 First, I will note, of course, we all know that

1 there was severance granted to Mr. Chauvin from the rest of
2 the defendants in the State Court case, and while I don't
3 know everything about those proceedings, I know that at
4 least part of that severance had to do with COVID concerns
5 and the space that they had in the courtroom, which I think
6 is something that at least at this time we don't have a
7 problem with based on our facilities and resources.

8 I would also note, as Your Honor has already
9 referenced, that the standard for severance is just very
10 difference between the State proceedings and the Federal
11 proceedings.

12 But what I would like to really point out here is
13 that defense counsel is making the point that jurors are
14 going to sit there knowing that Mr. Chauvin has been
15 convicted of murder for his conduct with respect to this
16 same incident. They are going to know that. Any juror who
17 is sitting there and knows that will know that whether or
18 not Mr. Chauvin is sitting in the courtroom. They will know
19 that he was part of that conduct and that he was convicted
20 of murder, and the question will still remain as to whether
21 the remaining defendants either failed to intervene or
22 provided or failed to provide medical assistance after that
23 conduct.

24 But I also want to be clear that this will not
25 involve additional evidence. No matter whether Mr. Chauvin

1 is there or not because Counts II and III, or most
2 specifically Count II has to do with failure to intervene.
3 No matter what, the government is going to have to prove
4 that Mr. Chauvin was engaging in an unreasonable use of
5 force. So it will be the same evidence that the government
6 puts on at the trial of the other three defendants,
7 regardless of whether Mr. Chauvin is sitting there or not.

8 As one point of clarification, Mr. Gray mentioned
9 that Mr. Chauvin is charged in all of the counts of the
10 indictment. He is charged in Counts I and III. He is not
11 charged in Count II, Failure to Intervene, and even more
12 significantly, neither is Former Officer Lane. He is also
13 not charged in Count II.

14 And, finally, I would just like to note, Your
15 Honor, it is going to be clear based on the instructions
16 provided to the jury that this is not a murder case. This
17 is a case involving Constitutional violations. So to the
18 extent there's any prejudice from the fact that Mr. Chauvin
19 was convicted of murder, I actually feel confident that the
20 defense will also be making that distinction that those are
21 not the charges here, and the jury will be appropriately
22 instructed. Thank you.

23 THE COURT: Ms. Sertich, do you know of any Bruton
24 testimonial confrontation concerns at this time?

25 MS. SERTICH: Your Honor, it's too early at this

1 point to make that statement.

2 THE COURT: Thank you. It seems like you were
3 saying at this point you don't know of any, is that what you
4 are saying?

5 MS. SERTICH: I don't know of any issues at that
6 point because we don't know yet which defendants will be
7 proceeding to trial or anything of that nature.

8 THE COURT: Fair enough. Anything else from the
9 Government?

10 MS. SERTICH: No. Thank you, Your Honor.

11 THE COURT: All right. Reply anyone from the
12 defense side?

13 MR. PAULE: Your Honor, if I may. With regard to
14 Ms. Sertich's argument that this is an entirely different
15 sort of fact scenario, and she basically comes right out and
16 admits that every juror will know that Derek Chauvin was
17 convicted of murder. Well, Derek Chauvin's defense in State
18 Court was that this was an authorized use of force. And in
19 this case, what they're arguing is that it's an unreasonable
20 use of force.

21 So it's essentially to have my client sitting next
22 to Mr. Chauvin, they're eliminating one of the elements that
23 they would need to prove otherwise, at least in the jury's
24 mind. I think the Government conceded as much at least in
25 the point of the argument. And I think, you know,

1 Ms. Sertich is just being candid about that.

2 THE COURT: Mr. Gray or Mr. Plunkett?

3 MR. GRAY: Well, I guess my response is that the
4 indictment, Count III, it says, "the offense resulted in
5 bodily injury to and the death of George Floyd." I did look
6 at the instructions, but I haven't in a while, but my memory
7 is that the jury decides whether or not the offense caused
8 the death of George Floyd. If that's the case, it's the
9 same as the state case. I think that is part of one of the
10 elements in the Federal case.

11 It's the same facts, Judge. Whether the charge is
12 different or not, it's the same evidence that's going to
13 come in this case that came in the State case. That's all I
14 have. Thank you, Judge.

15 THE COURT: Okay. Thank you, Mr. Plunkett?

16 MR. PLUNKETT: Nothing further, Your Honor.

17 THE COURT: Okay. Thank you. Ms. Sertich,
18 anything in response specifically to what Mr. Paule and
19 Mr. Gray just replied?

20 MS. SERTICH: Just in response to Mr. Paule's
21 statement that Mr. Chauvin's defense in State Court was that
22 he was engaging in a reasonable use of force, I would
23 imagine that that would be his defense here as well and that
24 that would only be helpful and the same type of argument
25 that the rest of defense counsel would be making in this

1 case.

2 THE COURT: Okay. Mr. Paule, anything in response
3 to that sur-response? I'm not sure what to call it.

4 MR. PAULE: It's just a different way of phrasing
5 it, but beauty is essentially in the eye of the beholder.
6 You know, what Ms. Sertich is alleging that will be helpful
7 to us, we might not view it in that same context, and I
8 think it goes again directly to one of the elements that the
9 Government is purported to prove here.

10 THE COURT: Okay. Thank you. At this point, I
11 think we've covered the motions to sever, unless the
12 Government, you have anything else on that. That's ECF 69
13 and ECF 78. Anything else on severance other than
14 post-hearing briefing?

15 MS. SERTICH: No, thank you, Your Honor.

16 THE COURT: Mr. Paule?

17 MR. PAULE: Nothing. Thank you, Your Honor.

18 THE COURT: Mr. Plunkett?

19 MR. PLUNKETT: Nothing further. Thank you, Your
20 Honor.

21 THE COURT: All right. Mr. Gray?

22 MR. GRAY: No, Your Honor. Thank you.

23 THE COURT: All right. Again, we'll switch it up
24 a little bit on you folks, but is there anything at this
25 point that I've missed as far as the ECF motions I need to

1 cover? We had a lot of them, so I think I got them all, but
2 I think last week when we met preliminarily, I encourage
3 everyone to double check their ECF docket numbers, and if
4 you could double check to just make sure we cover
5 everything.

6 Ms. Sertich, anything else?

7 MS. SERTICH: Just flipping through, Your Honor.

8 THE COURT: Yeah, go ahead. Take your time. I
9 apologize.

10 MS. SERTICH: I believe you got them all. Thank
11 you.

12 THE COURT: Any other issues folks want to be
13 heard on before we get to the briefing and so forth?
14 Government, anything else for purposes of today, this
15 hearing?

16 MS. SERTICH: Not from the government, thank you.

17 THE COURT: Mr. Nelson?

18 MR. NELSON: Nothing on behalf of Mr. Chauvin,
19 Your Honor.

20 THE COURT: Mr. Paule?

21 MR. PAULE: Nothing further. Thank you, Your
22 Honor.

23 THE COURT: Mr. Plunkett?

24 MR. PLUNKETT: Nothing further, Your Honor.

25 THE COURT: And Mr. Gray?

1 MR. GRAY: No, Your Honor. Nothing further.

2 THE COURT: Okay. Okay, folks, so the motions
3 that I would like post-hearing briefing on, one relates to
4 the motions to strike surplusage. I believe that was ECF 87
5 for Mr. Kueng and 89 for Mr. Lane. And then there's ECF 69
6 and 78, and those relate to Defendant Kueng, Lane and
7 Thao's motion to sever, so those two I would like additional
8 briefing on.

9 Will anyone be requesting transcripts on this one
10 to capture the arguments? Ms. Sertich, do you know?

11 MS. SERTICH: Yes, Your Honor, we'll be requesting
12 a transcript.

13 THE COURT: Okay. Mr. Nelson?

14 MR. NELSON: No, Your Honor. As Mr. Chauvin is
15 not engaged in either of those motions, we would seek to be
16 excused from the briefing schedule.

17 THE COURT: Mr. Paule?

18 MR. PAULE: Your Honor, I think we'll be
19 requesting a transcript at least to the issue of severance.
20 Thank you.

21 THE COURT: Okay. Mr. Plunkett?

22 MR. PLUNKETT: Yes, Your Honor. We'd be
23 requesting a transcript.

24 THE COURT: Very well. Mr. Gray?

25 MR. GRAY: Yes, Your Honor. Is the Government

1 going to request it, and we get a copy? Is that cheaper?

2 MS. SERTICH: I don't believe that's something
3 court reporters like to hear.

4 THE COURT: Well, I have enough issues I have to
5 resolve, so I'm not going to get in the middle of that one,
6 but, yes, we will need transcripts. At this point, let's
7 go -- don't cut the video or audio, but let's go off the
8 formal record so we can discuss briefing schedule and then
9 once we've come to agreement on briefing schedule, we'll go
10 back on the official record and make the dates known. So we
11 are officially off the record at this time to discuss
12 briefing.

13 (Off the record discussion between Court and
14 counsel.)

15 (IN OPEN COURT)

16 THE COURT: We are now back on the record in the
17 arraignment and motions hearing of the case of United States
18 of America versus Derek Chauvin, Tou Thao, J Alexander
19 Kueng, and Thomas Lane.

20 The record should reflect that we took a brief
21 recess off the record anyway to discuss scheduling and
22 availability of transcript, and here's the understanding of
23 the Court after the discussion with the parties, that the
24 parties are agreeable to the schedule as follows:

25 The transcript will be available by September 21,

1 2021. Defendant's briefs will be due October 12, 2021. And
2 Government's response brief will be due October 26, 2021.
3 With that, let me just double check my notes and make sure I
4 cover everything I want to.

5 With that, for purposes of this hearing, the Court
6 has no additional items that I need to cover for today.
7 Government, anything else for purposes of today's hearing?

8 MS. SERTICH: No, thank you, Your Honor.

9 THE COURT: And Mr. Nelson for Mr. Chauvin?

10 MR. NELSON: No, Your Honor.

11 THE COURT: And Mr. Paule for Mr. Thao?

12 MR. PAULE: No. Thank you, Your Honor.

13 THE COURT: Mr. Plunkett for Mr. Kueng?

14 MR. PLUNKETT: Nothing further, Your Honor.

15 THE COURT: And Mr. Gray for Mr. Lane?

16 MR. GRAY: Nothing further, thank you.

17 THE COURT: All right. Thank you, everyone, for
18 being prepared, and thank you for your patience. I'm glad
19 we went over everything in an organized fashion, and thank
20 you, everyone. We are in recess.

21 (Court adjourned at 12:03 p.m.)

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REPORTER'S CERTIFICATE

I, **Maria V. Weinbeck**, certify that the foregoing is
a correct transcript from the record of proceedings in the
above-entitled matter.

Certified by: s/ Maria V. Weinbeck
Maria V. Weinbeck, RMR-FCRR